

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

AT&T COMMUNICATIONS – EAST,  
INC., f/k/a AT&T Communications, Inc.,  
a Delaware Corporation; AT&T CORP.,  
f/k/a American Telephone and Telegraph  
Company, a New York Corporation,

Plaintiffs,

v.

CENTRAL PUGET SOUND  
REGIONAL TRANSIT AUTHORITY, a  
Regional Transit Authority; BNSF  
RAILWAY COMPANY f/k/a Burlington  
Northern and Santa Fe Railway Company,  
f/k/a Burlington Northern Railroad  
Company,

Defendants.

---

CENTRAL PUGET SOUND  
REGIONAL TRANSIT AUTHORITY, a  
Regional Transit Authority,

Defendant/Third-  
Party Plaintiff,

v.

LEVEL 3 COMMUNICATIONS, LLC, a  
foreign limited liability corporation; MCI  
COMMUNICATIONS SERVICES, INC.,  
d/b/a Verizon Business Services,

Third-Party  
Defendants.

CASE NO. C07-5186BHS

ORDER GRANTING JOINT  
MOTION FOR  
REALIGNMENT AND  
DENYING SOUND  
TRANSIT'S MOTION TO  
DISMISS FOR LACK OF  
SUBJECT MATTER  
JURISDICTION

1 This matter comes before the Court on Sound Transit's Motion to Dismiss for  
2 Lack of Subject Matter Jurisdiction (Dkt. 62) and the Joint<sup>1</sup> Motion for Realignment (Dkt.  
3 78). The Court has considered the pleadings filed in support of and in opposition to the  
4 motions and the remainder of the file herein.

### 5 I. FACTUAL AND PROCEDURAL BACKGROUND

6 On April 17, 2007, AT&T Communications – East, Inc. and AT&T Corp.  
7 (“AT&T”) filed a declaratory judgment action. Dkt. 1. The facts, according to the second  
8 amended complaint, are as follows: In 1987, AT&T sought to install a fiber optic  
9 telecommunications transmissions system and certain equipment and structures along a  
10 railroad corridor between Renton, Washington and Eugene, Oregon. Dkt. 48 at 3. The  
11 railroad corridor was owned and controlled by Burlington Northern Railroad Company,  
12 now known as BNSF Railway Company (“BNSF”). *Id.* On July 21, 1987, AT&T entered  
13 into a right-of-way agreement (“the ROW Agreement”) with BNSF whereby BNSF  
14 granted AT&T an easement and other rights. *Id.* Pursuant to the ROW Agreement, AT&T  
15 constructed and installed fiber optic cable facilities within the railroad corridor between  
16 Renton and Eugene, including the BNSF line between Tacoma and Lakewood in the State  
17 of Washington. *Id.* at 5.

18 On September 25, 2003, the Central Puget Sound Regional Transit Authority  
19 (“Sound Transit”) board of directors authorized the acquisition of certain real property  
20 interests owned by BNSF, and BNSF agreed to sell certain real property to Sound Transit  
21 in lieu of condemnation. *Id.* By quitclaim deeds, BNSF conveyed to Sound Transit the  
22 Lakeview North Rail Line Property, the Lakeview South Rail Line Property, and the  
23 Lakeview Stations Property. *Id.* at 6. On September 28, 2004, BNSF assigned all of its  
24 rights to any existing easements affecting or relating to the Lakeview North Rail Line  
25

---

26  
27 <sup>1</sup> While labeled a “joint motion,” the motion is not joined by BNSF Railway Company,  
28 and BNSF has filed a response to the motion.

1 Property to Sound Transit, and Sound Transit correspondingly assumed all duties and  
2 obligations under such easements. *Id.* at 6-7.

3 On July 6, 2006, Sound Transit notified AT&T that Sound Transit acquired  
4 BNSF's railroad right-of-way running from M Street in Tacoma to Nisqually,  
5 Washington and intended to start construction of two projects within the right-of-way in  
6 January of 2007. *Id.* at 7. Sound Transit further notified AT&T that its facilities must be  
7 relocated prior to commencement of the work in order to avoid removal of the facilities.  
8 *Id.* at 7-8.

9 On August 16, 2006, AT&T provided Sound Transit with a copy of the ROW  
10 Agreement and notified Sound Transit that it was entitled to compensation of actual costs  
11 and expenses associated with the relocation of its fiber optic cable facilities. *Id.* at 8.

12 Plaintiffs contend that they never consented to an assignment of their rights and  
13 obligations under the ROW Agreement to Sound Transit. *Id.* Plaintiffs contend that they  
14 are under no obligation to relocate their facilities at their own expense. Plaintiffs seek a  
15 judgment declaring that Sound Transit "does not have any authority under the ROW  
16 Agreement to require AT&T to relocate its fiber optic cable facilities" and that if Sound  
17 Transit has such authority, Plaintiffs are entitled to reimbursement of actual costs and  
18 expenses pursuant to the ROW Agreement or to RCW 8.26.010, *et seq.* *Id.* at 10.

19 On July 25, 2007, after the complaint was filed, Plaintiffs' counsel received a copy  
20 of an Assignment and Assumption of Third Party Leases/Easements/Licenses between  
21 BNSF and Sound Transit. Dkt. 37 at 3. This document apparently contradicts Plaintiffs'  
22 belief that BNSF did not assign its rights under the ROW Agreement to Sound Transit.  
23 Plaintiffs contend that if BNSF's assignment of the ROW Agreement was valid, BNSF  
24 may be in breach of the ROW Agreement.

25 Plaintiffs therefore sought leave of Court to file an amended complaint adding  
26 BNSF as a defendant. Dkt. 37. Sound Transit did not oppose the motion but asked the  
27 Court to leave all scheduling deadlines as previously set. Dkt. 39. Level 3  
28

Communications, LLC (“Level 3”) and MCI Communications Services, Inc. (“MCI”) did not respond to the motion. The Court granted Plaintiffs leave to amend their complaint and add BNSF as a defendant, and noted that “it appear[ed] that adding BNSF would not disturb the Court’s jurisdiction.” Dkt. 41 at 5. Plaintiffs thereafter filed an amended complaint including BNSF as a defendant. Dkt. 42.

Sound Transit now moves to dismiss this matter, contending that the addition of BNSF as a defendant destroys diversity jurisdiction. Dkt. 62. The parties, with the exception of BNSF, also move for realignment of the parties to cure any jurisdictional defect caused by the addition of BNSF. Dkt. 78. The parties to the Joint Motion for Realignment (Dkt. 78) contend that realignment would render Sound Transit’s Motion to Dismiss (Dkt. 62) moot. The Court has therefore considered these motions concurrently.<sup>2</sup>

## II. DISCUSSION

The federal diversity jurisdiction statute, 28 U.S.C. § 1332, vests district courts with jurisdiction over “all civil actions” between citizens of different states where the matter in controversy exceeds \$75,000. 28 U.S.C. § 1332(a). Where there is no change in the parties to the suit, diversity is measured at the time of filing. *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 571-75 (2004). Subject matter jurisdiction may be raised at any point during the proceedings. *See, e.g., Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 711 (9th Cir. 1992) (no waiver after four-year delay).

Courts are not bound by the parties’ pleadings in determining whether there is diversity of citizenship:

The courts, not the parties, are responsible for aligning the parties according to their interests in the litigation. If the interests of a party named as a defendant coincide with those of the plaintiff in relation to the purpose of the lawsuit, the named defendant must be realigned as a plaintiff for jurisdictional purposes.

---

<sup>2</sup> Two other motions are currently pending before the Court and ripe for consideration. Dkt. 56 ( BNSF Railway Company’s FRCP 12(b)(6) Motion to Dismiss); Dkt. 59 (BNSF Railway Company’s Motion for Continuance. These motions were renoted due to the pendency of the Joint Motion for Realignment and will be addressed by separate order.

1 *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523 (9th Cir.  
2 1987). Put another way, parties may be realigned to reflect whether their actual interests  
3 are adverse to one another with respect to the primary matter in dispute. *See, e.g.*,  
4 *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 873 (9th Cir.  
5 2000) (“We must align for jurisdictional purposes those parties whose interests coincide  
6 respecting the ‘primary matter in dispute.’”); *Continental Airlines, Inc.*, 819 F.2d at  
7 1523; *Standard Oil Co. of Cal. v. Perkins*, 347 F.2d 379, 382 (9th Cir. 1965).

8 If diversity is lacking despite proper alignment of the parties, dispensable,  
9 nondiverse parties may be dismissed pursuant to Federal Rule of Civil Procedure 21 in  
10 order to cure the jurisdictional defect. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490  
11 U.S. 826, 832 (1989); *Continental Airlines, Inc.*, 819 F.2d at 1524; Fed. R. Civ. P. 21  
12 (“Misjoinder of parties is not a ground for dismissing an action. On motion or on its own,  
13 the court may at any time, on just terms, add or drop a party. The court may also sever  
14 any claim against a party.”).

15 The parties in this case, with the exception of BNSF, contend that the pleadings do  
16 not reflect the true alignment of the parties and that proper alignment of the parties  
17 demonstrates that diversity jurisdiction is present. Dkt. 78. BNSF acknowledges that  
18 “realignment could preserve jurisdiction” but opposes realignment because “it would be  
19 inefficient and uneconomical for the Court to realign the parties here without also  
20 providing BNSF sufficient time to prepare for trial.” Dkt. 80 at 2-3.

21 The Court agrees that realignment is proper and cures any jurisdictional defect.  
22 Although AT&T was the first to file this suit, the true “plaintiff” in this case is Sound  
23 Transit, the party seeking to compel AT&T, Level 3, and MCI to relocate their facilities.  
24 AT&T made BNSF a party to recover for breach of contract in the event that Sound  
25 Transit is found to have authority under the ROW Agreement to require AT&T to  
26 relocate its fiber optic cable facilities. *See* Dkt. 48 at 13 (seeking “any actual costs and  
27 expenses incurred by AT&T in relocating its fiber optic cable facilities” at the direction of  
28

1 Sound Transit). BNSF is not properly considered AT&T's "co-defendant" because Sound  
2 Transit has not asserted any claims against BNSF. *See* Dkt. 77 (Sound Transit's answer).  
3 The dispute between BNSF and AT&T is therefore most appropriately classified as an  
4 impleader claim under Federal Rule of Civil Procedure 14. *See* Fed. R. Civ. P. 14(a)(1)  
5 ("A defending party may, as third-party plaintiff, serve a summons and complaint on a  
6 nonparty who is or may be liable to it for all or part of the claim against it.").

7 Having aligned the parties according to their interests, the Court concludes that  
8 there is diversity jurisdiction in this matter. All properly aligned plaintiffs are diverse  
9 from all properly aligned defendants. Sound Transit is a regional transit authority formed  
10 under the laws of the State of Washington. Dkt. 11 at 2. AT&T Communications – East,  
11 Inc., AT&T Corp., Level 3, and MCI are foreign corporations. Dkt. 48 at 2. Dkt. 26 at 3;  
12 Dkt. 27 at 3.

13 AT&T Communications – East, Inc. is a Delaware corporation, and AT&T Corp.  
14 is a New York corporation. Dkt. 48 at 2. These entities are properly aligned as third-party  
15 plaintiffs against BNSF, a Delaware corporation.

16 Section 1367 of Title 28 governs supplemental jurisdiction and provides in part as  
17 follows:

18 (a) Except as provided in subsections (b) and (c) or as expressly  
19 provided otherwise by Federal statute, in any civil action of which the  
20 district courts have original jurisdiction, the district courts shall have  
21 supplemental jurisdiction over all other claims that are so related to claims  
22 in the action within such original jurisdiction that they form part of the  
23 same case or controversy under Article III of the United States  
24 Constitution. Such supplemental jurisdiction shall include claims that  
25 involve the joinder or intervention of additional parties.

26 (b) In any civil action of which the district courts have original  
27 jurisdiction founded solely on section 1332 of this title, the district courts  
28 shall not have supplemental jurisdiction under subsection (a) over claims  
by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of  
the Federal Rules of Civil Procedure, or over claims by persons proposed  
to be joined as plaintiffs under Rule 19 of such rules, or seeking to  
intervene as plaintiffs under Rule 24 of such rules, when exercising  
supplemental jurisdiction over such claims would be inconsistent with the  
jurisdictional requirements of section 1332.

1 28 U.S.C. § 1367. Subsection (a) provides for supplemental jurisdiction over claims  
2 arising out of the “same case or controversy,” and subsection (b) places limits on the  
3 exercise of such jurisdiction when jurisdiction is based solely on diversity of citizenship.

4 In this case, AT&T’s claim against BNSF arises out of the same case or  
5 controversy as the dispute between Sound Transit and AT&T. The Court therefore  
6 concludes that exercise of jurisdiction over this claim is proper under 28 U.S.C. §  
7 1367(a). Furthermore, the Court concludes that the exercise of jurisdiction over AT&T’s  
8 claim against BNSF would not be inconsistent with the requirements of the diversity  
9 statute. AT&T’s claim is supplemental to Sound Transit’s “claim,” over which the Court  
10 has diversity jurisdiction. As a properly-aligned defendant, AT&T may implead a  
11 third-party defendant (BNSF) who is a citizen of AT&T’s state. *See United States v.*  
12 *United Pacific Ins. Co.*, 472 F.2d 792, 793-94 (9th Cir. 1973).


13 The Court therefore concludes that, when the parties are properly aligned, this  
14 matter arises under the Court’s diversity jurisdiction. Though not specifically sought in  
15 the Joint Motion for Realignment (Dkt. 78), the parties propose an amendment of the  
16 caption in this matter to reflect the parties’ actual alignment. *See* Dkt. 85-2. The Court is  
17 not inclined to amend the caption at this juncture but will revisit this matter if amendment  
18 proves necessary.

### 19 III. ORDER

20 Therefore, it is hereby

21 **ORDERED** that Sound Transit’s Motion to Dismiss for Lack of Subject Matter  
22 Jurisdiction (Dkt. 62) is **DENIED**, and the Joint Motion for Realignment (Dkt. 78) is  
23 **GRANTED**.

24 DATED this 26th day of June, 2008.

25   
26 BENJAMIN H. SETTLE  
27 United States District Judge  
28